Reciprocal Immunity

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These are the truncated facts of United States v. Davis, *a recent Seventh Circuit opinion that has led to a cert. petition to the Supreme Court. The same result, however, could have occurred in nearly any court, with cases across the country standing for the proposition that a grant of immunity to a witness for the prosecution doesn't require reciprocal immunity for a directly contradictory defense witness.*

This essay advances a reciprocal rights theory. It argues that the Constitution precludes statutes and rules from providing nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial, unless reciprocity would implicate a significant state interest. Therefore, unless a significant State interest is involved, a grant of immunity to a prosecution witness should trigger reciprocal immunity to a directly contradictory defense witness.

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INTRODUCTION

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This essay advances a reciprocal rights theory. It argues that the Constitution precludes statutes and rules from providing nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial, unless reciprocity would implicate a significant state interest. Therefore, unless a significant State interest is involved, a grant of immunity to a prosecution witness should trigger reciprocal immunity to a directly contradictory defense witness.

I. PRIVILEGE AGAINST SELF-INCRIMINATION

To understand the argument for reciprocal immunity, we must begin by considering the privilege against self-incrimination. In relevant part, the Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[2] In *Hoffman v. United States*, the Supreme Court held that there are two circumstances in which a witness can plead the Fifth: (1) where an answer to a question, such as "Did you rob the bank," would directly support a conviction; and (2) where an answer to a question, such as, "Where is the money that was taken from the bank," could furnish a link in the chain of evidence needed to prosecute the claimant.[3]

In *Ohio v. Reiner*, the Court later held that a witness can only plead the Fifth based on reasonable cause to apprehend danger from a direct answer to a question and noted that dangers of "imaginary and unsubstantial character" won't suffice.[4] That said, the Court also held in *Reiner* that a witness can plead the Fifth even though she maintains her innocence.[5] Therefore, in *Reiner*, even though the prosecution claimed that a two-month old child was the victim of "shaken baby syndrome" based upon his father's actions, the child's babysitter qualified for Fifth Amendment protection.[6]

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1. 845 F.3d 282 (7th Cir. 2016), *cert. denied*, 138 S. Ct. 65 (2017).
2. U.S. CONST. amend. V.
3. 341 U.S. 479, 486 (1951).
4. 532 U.S. 17, 21 (2001) (per curiam) (quoting Mason v. United States, 244 U.S. 362, 366 (1917)).
5. *Id.*
6. *Id.* at 18.

II. IMMUNITY

When a witness states an intention to plead the Fifth, the prosecutor can offer her immunity to try to secure her testimony. There are two types of immunity. The Compulsory Testimony Act of 1893 and subsequent statutes only permitted prosecutors to offer transactional immunity.[7] Transactional immunity means that the witness can never be prosecuted for the crime/transaction that is the subject of her testimony.[8] If Co-Defendant accepts transactional immunity to testify against Defendant at a bank robbery trial, the State cannot thereafter prosecute Co-Defendant for that bank robbery or any crimes related to that robbery. For example, the prosecutor eventually gave the babysitter in *Reiner* transactional immunity, meaning she couldn't be prosecuted for any crime in connection with the child's death.[9]

The second type of immunity is use and derivative use immunity.[10] This type of immunity can be explained by re-examining the bank robbery hypothetical. Under use immunity, if the State were to prosecute Co-Defendant for bank robbery, it could not introduce/use a transcript of Co-Defendant's immunized testimony from Defendant's trial. Furthermore, under derivative use immunity, the State couldn't use Co-Defendant's immunized testimony to obtain/derive additional evidence to use against Co-Defendant at her subsequent bank robbery trial. For instance, assume that Co-Defendant testified at Defendant's trial that they committed the crime with Accomplice and buried the money behind Accomplice's house, followed by police interviewing Accomplice and digging up the money. Based upon derivative use immunity, the State couldn't introduce Accomplice's testimony or the recovered money at Co-Defendant's trial because they were the product of Co-Defendant's immunized testimony.

Conversely, the State could prosecute Co-Defendant based upon evidence obtained from an "independent source" unconnected to the immunized testimony.[11] Imagine that, after Defendant's trial, Eyewitness tells a police officer, "I've kept quiet until now because Co-Defendant threatened me, but Co-Defendant confessed to me that she robbed the bank with Defendant." If Co-Defendant testified at Defendant's trial pursuant to a grant of use and derivative use immunity, the State could still prosecute Co-Defendant for bank robbery and use testimony by Eyewitness, an independent source.

In *Kastigar v. United States*, the Supreme Court found that an offer of use and derivative use immunity is sufficient to compel testimony over a claim of Fifth Amendment privilege.[12] Around the time of *Kastigar*, Congress repealed its transactional immunity statute and replaced it with a use and derivative use statute contained in 18 U.S.C. §§ 6001 to 6005.[13] Courts across the country have consistently held that the decision of whether to grant immunity is solely within the discretion of

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7. *See* State v. Kenny, 342 A.2d 189, 193 (N.J. 1975).
8. *See, e.g.*, State v. Belanger, 210 P.3d 783, 787 (N.M. 2009).
9. *Reiner*, 532 U.S. at 18.
10. Kastigar v. United States, 406 U.S. 441, 449 (1972).
11. *Id.* at 461.
12. *Id.* at 462.
13. *See* 18 U.S.C. §§ 6001–6005 (2012).

the prosecutor and that neither a judge nor defense counsel can force a prosecutor to grant immunity to a defense witness.[14]

III. RECIPROCAL IMMUNITY

With prosecutors having sole discretion over grants of immunity, situations like the one in the introduction recur, with the prosecutor granting immunity to a witness whose testimony will incriminate the defendant and refusing to grant immunity to a directly contradictory witness whose testimony would exonerate the defendant. In such situations, courts have categorically concluded that judges lack authority under the federal immunity statute and state counterparts to (1) compel prosecutors to grant reciprocal immunity; or (2) grant reciprocal immunity themselves.[15]

That said, these courts also have noted that a prosecutor's decision to grant immunity is constrained by the Due Process Clause, meaning that conduct contravening the Clause could require reciprocal immunity or other relief.[16] According to almost every court, a prosecutor violates the Due Process Clause by granting immunity to a government witness and not granting immunity to a directly contradictory defense witness in only one scenario: when the prosecutor intentionally attempts to distort the fact-finding process.[17] Courts have identified two types of intentional distortion. First, the prosecutor could grant immunity to a government witness and refuse to grant immunity to a defense witness whom the prosecutor had intimidated or harassed to discourage her testimony.[18] Second, the prosecutor could refuse to give immunity to a defense witness with the goal of precluding the jury from hearing exculpatory testimony.[19] It appears, however, that no court has ever found such prosecutorial misconduct. In its 2009 opinion in *State v. Belanger*, the Supreme Court of New Mexico located no cases in which a prosecutor was forced to grant reciprocal immunity to a defense witness.[20]

When a defendant claims that the failure to grant reciprocal immunity to a directly contradictory defense witness was an attempt at intentional distortion, there are typically three results, all of which result in no relief. First, prosecutors in some cases claim that granting immunity might interfere with future prosecution of defense witnesses, which the First Circuit found is "a major reason why judges have not shared the enthusiasm of student law review editors for creating a 'right' of defendants to insist on immunity for defense witnesses."[21] Second, prosecutors in other cases assert that they think prospective defense witnesses are lying and that they don't want to facilitate perjury by immunizing their testimony. This was the sole claim made by the prosecutor in the *Davis* case from the introduction. Third, prosecutors in many cases never have to defend their refusal to grant reciprocal

14. *See, e.g.*, United States v. Rocco, 587 F.2d 144, 147 (3rd Cir. 1978).
15. *See, e.g.*, United States v. Angiulo, 897 F.2d 1169, 1190 (1st Cir. 1990).
16. *Id.* at 1191.
17. *Id.*
18. *Id.* at 1192.
19. *Id.*
20. 210 P.3d 783, 797 (N.M. 2009).
21. United States v. Mackey, 117 F.3d 24, 27 (1st Cir. 1997).

immunity.[22] This is because several jurisdictions require defendants to make "substantial evidentiary showing[s]" of intent to distort the fact-finding process before requiring prosecutors to explain why they refused to grant reciprocal immunity.[23] Given that very few defendants are able to make such a showing, prosecutors rarely have to explain their reasoning.

Until recently, defendants in one federal judicial circuit might have had an easier time in forcing prosecutors to grant reciprocal immunity. In its 1980 opinion in *Government of the Virgin Islands v. Smith*, the Third Circuit suggested that a defendant could compel a prosecutor to grant reciprocal immunity to a defense witness if she could satisfy five requirements: "immunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity."[24]

In its 2013 opinion in *United States v. Quinn*, however, the Third Circuit abrogated *Smith*, concluding that courts can never force prosecutors to grant immunity because the power to grant immunity rests solely with the executive branch.[25] That said, the court concluded that a defendant who can establish the five *Smith* factors still establishes a due process violation. But, according to the court, the remedy for such a violation is dismissal of charges rather than reciprocal immunity.[26] Some courts applying the "intentional distortion" test have similarly found that courts lack the authority to force prosecutors to grant reciprocal immunity.[27]

IV. RECIPROCAL RIGHTS

This essay posits that there are two types of rights in criminal cases: unilateral rights and reciprocal rights. Certain criminal rights are unilateral, with the prosecution having an obligation to the defense and the defense having no reciprocal obligation to the prosecution. For instance, pursuant to *Brady v. Maryland*, the prosecution has a due process duty to disclose material exculpatory evidence to the defense while the defense has no reciprocal duty to disclose material inculpatory evidence to the prosecution.[28] Given that this *Brady* right is unilateral, the defense has to prove prosecutorial misconduct; for example, the failure to turn over certain evidence.[29]

As the foregoing material makes clear, courts have looked at defense witness immunity from a unilateral rights perspective and concluded that defendants are not entitled to relief based on failure to immunize defense witness testimony unless they can establish prosecutorial misconduct. This essay contends, however, that courts should consider defense witness immunity under a reciprocal rights analysis.

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22. *Id.*
23. *E.g.*, United States v. Hooks, 848 F.2d 785, 802 (7th Cir. 1988).
24. 615 F.2d 964, 972 (3rd Cir. 1980).
25. 728 F.3d 243, 254 (3rd Cir. 2013).
26. *Id.* at 261.
27. *See, e.g.*, United States v. Allebban, 578 F. App'x 492, 505 (6th Cir. 2014).
28. *See, e.g.*, Middleton v. United States, 401 A.2d 109, 116 n.11 (D.C. 1979).
29. *See, e.g.*, Ferrara v. United States, 384 F. Supp. 2d 384, 432 (D. Mass. 2005).

Specifically, there are at least three situations in which the Supreme Court or Congress has concluded that application of a statute or rule conferring a benefit on the State requires a reciprocal benefit to the defendant, unless a significant state interest is implicated. The following three subsections explore these three situations that support a reciprocal rights theory.

A. Reciprocal Discovery

In *Williams v. Florida*, Johnny Williams declared his intent to claim an alibi defense at his robbery trial and challenged the constitutionality of Florida's alibi notice statute.[30] Under the statute, a prosecutor could make a written demand for the defendant to provide pre-trial notice of the place he claimed to be at the time of the crime and the names and addresses of alibi witnesses.[31] In its 1970 opinion, the Supreme Court rejected Williams's claim that this statute violated his Fifth Amendment privilege against self-incrimination, concluding that the statute merely accelerated the timing of a disclosure he was going to make at trial.[32] In reaching this conclusion, the Court noted that Florida's alibi notice statute was "carefully hedged with reciprocal duties requiring state disclosure to the defendant."[33]

Three years later, the Supreme Court issued its opinion in *Wardius v. Oregon*, in which Ronald Dale Wardius had been convicted of the sale of narcotics.[34] Wardius failed to comply with Oregon's alibi notice statute but still called an alibi witness, who testified that she was with Wardius at a drive-in movie at the time of the crime.[35] Thereafter, the judge granted the prosecutor's motion to strike this testimony based upon the defense's failure to comply with the alibi notice statute.[36]

After he was convicted, Wardius appealed, claiming that Oregon's alibi notice statute was unconstitutional because it did not provide for reciprocal discovery.[37] The Supreme Court agreed, concluding that, unlike the statute in Florida, Oregon's alibi notice statute had no reciprocal provision requiring the prosecution to disclose to the defense: the names and addresses of witnesses it planned to use to refute the defendant's alibi defense.[38] The Court noted that "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded," but found that "it does speak to the balance of forces between the accused and his accuser."[39] Accordingly, the Court concluded that "the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants."[40] In reaching this conclusion, the

30. 399 U.S. 78, 79 (1970).
31. *Id.*
32. *Id.* at 85.
33. *Id.* at 81.
34. 412 U.S. 470, 472 (1973).
35. *Id.* at 472–73.
36. *Id.* at 473.
37. *Id.*
38. *Id.* at 475.
39. *Id.* at 474.
40. *Id.* at 472.

Court implied that the State could possibly avoid reciprocal discovery by pointing to a significant state interest but observed that Oregon had not cited any such interest.[41]

Courts across the country have since applied *Wardius* to require reciprocal discovery in cases ranging from expert witness disclosures[42] to character witness disclosures.[43]

B. Right To Present a Defense

As support for its conclusion, the Supreme Court in *Wardius* cited its prior opinion in *Washington v. Texas* to claim that it had been especially suspicious of trial rules providing "nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial."[44] In *Washington v. Texas*, the State prosecuted Jackie Washington for the murder of his ex-girlfriend's new boyfriend.[45] At trial, Washington testified that his friend, Charles Fuller, took his shotgun and fatally shot the new boyfriend after Washington tried to persuade him to leave.[46] To support this claim, Washington tried to call Fuller, who would have testified that Washington "pulled at him and tried to persuade him to leave . . . before Fuller fired the fatal shot."[47] Fuller, however, was charged as an accomplice in the murder, and a Texas statute precluded persons charged as principals, accomplices, or accessories in the same crime from testifying on behalf of their co-defendants.[48]

After he was convicted, Washington appealed, claiming that the statute was unconstitutional.[49] The Supreme Court agreed, largely focusing on the fact that the statute allowed the State to call an alleged accomplice as a witness for the prosecution to incriminate a defendant while not allowing the accused to call an alleged accomplice to exonerate the defendant.[50] While the State claimed that this dichotomy was justified based on the greater likelihood that an accomplice would lie in a way that helps a defendant, the Court concluded that an accused was actually likelier to lie in a way that helps the State in an effort to "obtain favors from the prosecution."[51]

Having rejected the State's proposed dichotomy, the Court used the Sixth Amendment Compulsory Process Clause to conclude that:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense,

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41. *Id.* at 476.
42. *See* Grey v. State, 178 P.3d 154, 159–61 (Nev. 2008).
43. *See* State v. Pond, 193 P.3d 368, 380–82 (Haw. 2008).
44. *Wardius*, 412 U.S. at 474 n.6 (citing 388 U.S. 14, 22 (1967)). The Court also cited its landmark opinion of *Gideon v. Wainwright*.
45. 388 U.S. 14, 15 (1967).
46. *Id.* at 16.
47. *Id.*
48. *Id.*
49. *Id.* at 17.
50. *Id.* at 22.
51. *Id.* at 22–23.

> the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.[52]

The Supreme Court has since held that the State violates the right to present a defense by preventing a defendant from presenting witnesses and/or evidence unless the State's action serves legitimate interests in the criminal trial process in a manner that is neither arbitrary nor disproportionate.[53]

Lower courts have frequently applied the right to present a defense under a reciprocal rights analysis. For instance, in *State v. Watt*, at a DUI trial, the State introduced a video of the defendant's arrest which included audio of the defendant speaking.[54] While the defendant chose not to testify, he sought to introduce a voice exemplar without waiving his privilege against self-incrimination.[55] The defendant claimed that admission of this evidence would allow the jury to compare his voice in the exemplar to his voice in the video and determine whether he sounded intoxicated in the video.[56]

The trial court concluded that the defendant couldn't introduce the exemplar without waiving his privilege against self-incrimination.[57] On appeal, the defendant noted that the Supreme Court had repeatedly held that prosecutors can introduce voice exemplars as demonstrative evidence against nontestifying defendants without violating the privilege against self-incrimination.[58] Therefore, he "argue[d] that the due process principle of reciprocity requires that criminal defendants likewise be granted the right to seek admission of voice exemplars without being deemed to have waived their right to be free from self-incrimination."[59] The Missouri Court of Appeals agreed and noted that several other courts had reached similar conclusions.[60]

C. Statements Against Interest

Federal Rule of Evidence 801(c) defines hearsay as a statement other than one made by a declarant while testifying at trial offered to prove the truth of the matter asserted.[61] In turn, Rule 802 provides that hearsay is generally inadmissible unless there is an applicable exclusion or exception.[62] Rule 804(b)(3) contains one such exception. If a declarant is "unavailable," Rule 804(b)(3) allows a party to introduce the declarant's statements against interest, such as statements exposing the declarant to criminal liability.[63]

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52. *Id.* at 18–19.
53. *See, e.g.*, Holmes v. South Carolina, 547 U.S. 319, 319–20 (2006).
54. 531 S.W.3d 540, 544 (Mo. Ct. App. 2017).
55. *See id.*
56. *See id.*
57. *See id.* at 544–45.
58. *See id.* at 546.
59. *Id.*
60. *See id.* at 546–47.
61. FED. R. EVID. 801(c).
62. FED. R. EVID. 802.
63. FED. R. EVID. 804(b)(3).

Prior to 2010, Rule 804(b)(3) provided that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."[64] Under this pre-2010 version, assume that a Defendant was charged with bank robbery and Alternate Suspect confessed to committing the crime by herself. If Alternate Suspect pled the Fifth at Defendant's trial, the defense would not be able to introduce Alternate Suspect's statement unless there were sufficient corroborating circumstances, such as Eyewitness placing Alternate Suspect at the crime scene.

Conversely, assume that Accomplice confessed to taking part in the bank robbery, with the prosecution having the theory that Accomplice and Defendant committed the crime together. Under this pre-2010 version, the prosecution would not need to establish corroborating circumstances to admit Accomplice's statement if she pled the Fifth or were otherwise unavailable.

Several courts noted this lack of reciprocity, including the Fifth Circuit in *United States v. Alvarez*, in which the defendant "was convicted of heroin trafficking charges by the words of a dead man."[65] Specifically, the defendant's alleged co-conspirator made a statement incriminating himself and the defendant but died in a car accident before the defendant's trial.[66] The prosecution thereafter introduced the decedent's statement at trial, with the Fifth Circuit later noting that there were not corroborating circumstances clearly indicating the trustworthiness of the statement.[67]

The court acknowledged that Rule 804(b)(3) only required corroborating circumstances for statements offered to exculpate the accused, but it found that this disparate treatment violated the Confrontation Clause.[68] Therefore, the court created "a unitary standard" under Rule 804(b)(3), concluding that that the Confrontation Clause requires the prosecution to prove the same corroborating circumstances that the defense must prove to admit a statement exposing a declarant to criminal liability.[69] According to the Supreme Court, this unitary standard actually advanced and did not impede the State's interest in "the accuracy of the truth-determining process."[70]

Later, in 2010, Congress amended Rule 804(b)(3) based on cases "interpret[ing] Rule 804(b)(3) in this reciprocal manner"[71] to create a "unitary approach to declarations against penal interest."[72] Under the new Rule, a statement against interest must be "supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability."[73]

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64. *See* FED. R. EVID. 804(b)(3) (1997) (amended 2010).
65. 584 F.2d 694, 695 (5th Cir. 1978).
66. *See id.* at 695–96.
67. *Id.* at 701.
68. *See id.* at 700.
69. *See id.* at 701.
70. *See id.* at 700–01 (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)).
71. United States v. Bonds, No. C 07–00732 SI, 2011 WL 511387, at *6 n.6 (N.D. Cal. Feb. 15, 2011).
72. FED. R. EVID. 804(b)(3) advisory committee's note to 2010 amendments.
73. FED. R. EVID. 804(b)(3)(B).

V. RECIPROCAL IMMUNITY UNDER A RECIPROCAL RIGHTS ANALYSIS

Each of these decisions by the Supreme Court and Congress supports a reciprocal rights theory. Under this theory, the Constitution precludes statutes and rules from providing nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial, unless reciprocity would implicate a significant state interest. The following three subsections explore how the three parts of this theory support the requirement of reciprocal immunity.

A. Nonreciprocal Benefits

Each of the decisions from the prior section involved nonreciprocal benefits. In *Wardius*, the defendant had to provide the prosecution with notice of alibi witnesses while the prosecution did not have to provide the defense with notice of alibi rebuttal witnesses. In *Washington*, prosecutors could call accomplices as State's witnesses while defendants couldn't call accomplices as defense witnesses. And the pre-2010 version of Rule 804(b)(3) allowed prosecutors to object to uncorroborated statements against penal interest while defendants couldn't object to such statements on corroboration grounds.

The federal immunity statute and state counterparts are similarly nonreciprocal. A prosecutor can immunize an inculpatory witness to testify for the State while the defense can't immunize an exculpatory witness for the defense. Moreover, neither the defense nor the court can force a prosecutor to provide such reciprocal immunity to a directly contradictory defense witness. Courts generally have assessed arguments for reciprocal immunity under a unilateral rights theory and found that reciprocity is not required unless there is prosecutorial misconduct. Conversely, under a reciprocal rights theory, the lack of reciprocity alone should be sufficient to trigger constitutional scrutiny.

B. Interference with the Defendant's Ability To Secure a Fair Trial

Each of the decisions from the prior section also supports the proposition that the Constitution governs the "balance of forces between the accused and his accuser."[74] The Court in *Wardius* explicitly reached this conclusion, finding that the Due Process Clause has little to say about the amount of discovery provided but is concerned with this balance of forces, which is why it required reciprocal discovery. Similarly, the Supreme Court has held that the Compulsory Process Clause has little to say about witness competency rules,[75] but the Court in *Washington* concluded that the Clause required Texas to declare accomplices competent to testify for defendants because they were competent to testify for the State. These opinions belie the conclusion by the Third Circuit and some other courts that reciprocal immunity is precluded under the separation of powers doctrine. Under *Wardius*, if the lack of reciprocal immunity "interferes with the defendant's ability to secure a fair trial," courts can use the Constitution to level the playing field.

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74. Wardius v. Oregon, 412 U.S. 470, 474 (1973).
75. *See* Taylor v. Illinois, 484 U.S. 400, 410 (1988).

It appears clear that the lack of reciprocal immunity interferes with the defendant's ability to secure a fair trial to the same degree as two of the laws from the prior section. Under the Texas statute in *Washington*, assume that Defendant is charged with bank robbery. Accomplice One agrees to testify as a State's witness, and Accomplice Two agrees to testify as a defense witness. Under the statute, only Accomplice One would be allowed to testify. The *Washington* Court deemed this statute unconstitutional, concluding that the right to present a defense is "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies."[76]

The absence of reciprocal immunity can easily produce a similar result. Accomplice One might give a statement incriminating the defendant while Accomplice Two gives a statement exonerating the defendant. If both accomplices state an intention to plead the Fifth, a nonreciprocal grant of immunity to Accomplice One means that the jury will only hear the prosecution's version of facts, interfering with the defendant's ability to receive a fair trial.

A similar result also could have occurred under the pre-2010 version of Rule 804(b)(3). Assume in the above hypothetical that (1) Accomplice One's statement incriminates both Accomplice One and Defendant (*e.g.*, "Defendant and I robbed the bank"); (2) Accomplice Two's statement incriminates Accomplice Two but exonerates Defendant (*e.g.*, "I robbed the bank, and Defendant wasn't involved."); (3) both accomplices state an intention to plead the Fifth; and (4) neither accomplice is given immunity. If there weren't corroborating circumstances clearly indicating the trustworthiness of either statement, the prosecution could introduce Accomplice One's statement, but the defense couldn't introduce Accomplice Two's statement. Therefore, like the *Washington* statute, the pre-2010 version of Rule 804(b)(3) created situations that are analogous to cases where jurors hear from an immunized prosecution witness and don't hear from an unimmunized defense witness.

C. Significant State Interest

Courts in each of the contexts from the prior section considered whether there was a significant state interest that would justify nonreciprocity. In *Wardius*, the Court found no such interest. In *Washington*, the Court rejected the State's concern that an accomplice was likelier to lie for the defense than she was to lie for the prosecution. And the Fifth Circuit in *Alvarez* found that nonreciprocity under Rule 804(b)(3) actually cut against the State's interest in the accuracy of the truth-determining process.

Therefore, given that nonreciprocal immunity equally interferes with a defendant's ability to secure a fair trial, it would seem that the government should have to proffer a significant state interest to avoid having to grant reciprocal immunity. As noted, there are currently three main outcomes when a defendant claims a Due Process Clause violation based upon a prosecutor's refusal to grant reciprocal immunity.

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76. Washington v. Texas, 388 U.S. 14, 19 (1967).

1. Substantial Evidentiary Showings

First, some jurisdictions require defendants to make "substantial evidentiary showings" of intent to distort the fact-finding process, resulting in prosecutors rarely if ever having to explain why they failed to grant reciprocal immunity. Under this essay's reciprocal rights theory, defendants would not have to establish prosecutorial intent to distort, and the State would always have to proffer a significant state interest supporting nonreciprocity.

2. Prosecutorial Disbelief of Defense Witnesses

Second, some prosecutors have defended nonreciprocity based solely upon the belief that prospective defense witnesses are lying and the desire to avoid facilitating perjury. The State advanced a similar rationale in *Washington* when it claimed that there was a greater likelihood that an accomplice would lie on behalf of the defense as opposed to the prosecution. The *Washington* Court, however, rejected this analysis, concluding that an accused was actually likelier to lie on behalf of the State in an effort to "obtain favors from the prosecution."[77]

A similar analysis applies in the reciprocal immunity context. Assume that (1) Witness One tells the police that she saw Defendant shoot Victim; (2) Witness Two tells the police that she saw someone else shoot Victim; and (3) both witnesses have reasonable cause to apprehend danger if cross-examined regarding their statements (*e.g.*, because both had a motive to harm Victim and have placed themselves at the crime scene). In this case, Witness One seems analogous to an accomplice incriminating a defendant under the *Washington* statute while Witness Two seems analogous to an accomplice exonerating a defendant under the same statute.

It is important to note, though, that the *Washington* Court was assessing accomplice veracity in a general sense while prosecutors in reciprocal immunity cases are determining the credibility of particular defense witnesses. Therefore, it's easy to imagine a prosecutor in a specific case arguing that she doesn't want to immunize a defense witness who, say, has prior convictions or a version of events that is contradicted by extrinsic evidence.

The question then becomes whether a prosecutor's concern over defense witness veracity should overcome a defendant's interest in the jury hearing her version of events in a given case. This essay doesn't propose a comprehensive solution, but it does offer three considerations. First, a prosecutor's concern over facilitating perjury should be somewhat mitigated by the fact that most immunity agreements contain clauses allowing for future prosecutions for perjury arising out of the immunized testimony.[78] Second, if a prosecutor's skepticism of a defense witness's testimony is based upon contradictory extrinsic evidence, the prosecutor can use that evidence to impeach the witness and perhaps leave the defendant in a worse position than if the defense witness hadn't been given reciprocal immunity. Third, courts shouldn't view prosecutorial concerns about defense witness credibility in a vacuum. In many cases, the defense will have significant evidence to impeach an immunized prosecution

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77. *Id.* at 22–23.

78. JaneAnne Murray, *Proffer at Your Peril*, 19 WHITE-COLLAR CRIME REP. 2, 2 (2005).

witness. Therefore, if a judge is deciding whether there should be reciprocal immunity, she should consider the relative credibility of the immunized State's witness and the directly contradictory defense witness.

3. Future Prosecution

A third reason sometimes given by prosecutors to avoid reciprocal immunity is that granting it might interfere with future prosecution of defense witnesses. This seems like it could be a concern that would constitute a significant state interest implicated by reciprocal immunity. For example, imagine a scenario in which (1) Defense Witness and Defendant were involved in a bank robbery; (2) State's Witness gives a statement incriminating Defendant; (3) Defense Witness gives a statement exonerating Defendant; (4) Prosecutor gives State's Witness immunity; (5) Prosecutor is forced to give Defense Witness reciprocal immunity; (6) Defense Witness's false testimony helps the jury find Defendant "not guilty;"; and (7) Prosecutor can't subsequently prosecute Defense Witness for bank robbery due to immunity. In this case, reciprocal immunity prevents Prosecutor from securing convictions against two guilty parties.

This essay doesn't propose a comprehensive solution to such situations, but it again offers three considerations. First, courts will rarely have to assess whether there should be reciprocal immunity for a defense witness who has given a statement exposing herself to criminal liability. Assume that Alternate Suspect confesses to the murder that has led to charges against Defendant. If Alternate Suspect states an intention to plead the Fifth at Defendant's murder trial, there likely wouldn't be a need for immunity; assuming that Alternate Suspect's confession is sufficiently corroborated, it would be admissible as a statement against interest under Rule 804(b)(3).

Instead, the typical reciprocal immunity case will involve a defense witness who has given a statement that doesn't incriminate herself but does create a reasonable cause for apprehending danger if she were questioned about it a trial. An example of such a statement could be Eyewitness testifying that she saw someone other than Defendant murder Victim. Such a statement does not directly incriminate Eyewitness, but it does place her at the crime scene and could create danger on cross-examination, especially if Eyewitness had a motive to harm Victim. Now, the prosecutor in this case might have other evidence tying Eyewitness to Victim's murder, but the point is that the case for future prosecution based on such a statement is substantially weaker than if Victim had confessed to involvement in the crime.

This ties into the second consideration: If a prosecutor has evidence tying a defense witness to the crime, she should be able to impeach the witness's immunized testimony. Assume in the prior hypothetical that Prosecutor has evidence such as a witness who saw Eyewitness hand Defendant a gun and another witness who saw Eyewitness and Defendant drive off together after the murder. Prosecutor could use this evidence to impeach Eyewitness and possibly place Defendant in a worse position than if Eyewitness hadn't been given reciprocal immunity. In other cases, the prosecutor might not have (much) evidence tying a defense witness to the crime, which would reduce the opportunity for impeachment but also greatly reduce the odds that there would be a future prosecution of the witness.

A third consideration is that the dominant form of immunity is use and derivative use immunity, and this essay posits that this should be the only type of reciprocal immunity. This ties into the prior consideration. If a prosecutor has evidence tying a defense witness to the crime, a reciprocal grant of use and derivative use immunity probably won't put the prosecutor in a worse position with regard to future prosecution of the witness. In the prior hypothetical, the witnesses saying that Eyewitness handed Defendant a gun and drove off with her after the murder would be independent sources who could testify at Eyewitness's future trial, regardless of the grant of use and derivative immunity.

The only development that could hinder a future prosecution of an immunized witness would be an unexpected development during direct or cross-examination. For example, in the prior hypothetical, Prosecutor would expect Eyewitness to testify (1) on direct examination that someone other than Defendant killed Victim; and (2) on cross-examination that she did not hand Defendant a gun or drive away with her. Neither of these answers would hinder the future prosecution of Eyewitness, nor would an admission by Eyewitness that she handed Defendant a gun or drove away with her after the murder. Prosecutor couldn't use any of this testimony at Eyewitness's subsequent trial, but this testimony didn't exist before trial and didn't give the State any new leads to pursue. Therefore, in addition to the testimony of the two witnesses incriminating Eyewitness, Prosecutor could also use any new evidence derived from a continuing independent investigation of the crime.

Conversely, assume, for instance, that Eyewitness admitted on cross-examination not only that she drove away with Defendant after the murder but also surprisingly said that they drove away in Friend's car. Previously, an independent investigation might have led to admissible evidence connected to Friend and/or her car, but now such evidence couldn't be used against Eyewitness based upon derivative use immunity. The question in any given case should be whether this type of risk constitutes a significant enough state interest to overcome a defendant's interest in having a witness give testimony that directly contradicts a State's witness.

CONCLUSION

Courts have rejected reciprocal immunity based upon a unilateral rights analysis that requires a defendant to prove that the prosecutor intentionally attempted to distort the fact-finding process. This essay argues against this conclusion by proffering a reciprocal rights theory. Under this theory, the Constitution precludes statutes and rules from providing nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial, unless reciprocity would implicate a significant state interest. Therefore, unless a significant State interest is involved, a grant of immunity to a prosecution witness should trigger reciprocal immunity to a directly contradictory defense witness.